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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 557

OVERLAKES FREIGHT CORPORATION
Petitioner,

against

ELIZABETH MURPHY Administratrix of the goods, chattels and credits of Thomas Murphy, deceased.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ULYSSES S. THOMAS,
Counsel for Petitioner.

RUSSELL V. BLEECKER,
Attorney for Petitioner,
Terminal Tower,
Cleveland, Ohio.

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PETITION

Petitioner prays for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court, Southern District of New York, holding the petitioner liable to the respondent in damages for aggravation of a far-advanced tuberculous condition of the respondent's intestate, one Thomas Murphy, whose condition was not disclosed to the petitioner, his employer.

The opinion of the Court of Appeals was handed down on October 28, 1949 (R. p. 153) and its mandate was filed in the District Court on November 14, 1949. Jurisdiction of this Court is invoked under 28 U. S. Code 1254 and 28 U. S. Code 2101 (c).

The District Court's judgment was filed December 20, 1948, without opinion. The opinion of the Court of Appeals has not yet been officially published.

Statement

The respondent's intestate, on October 28, 1946, brought an action, later carried on by the respondent, seeking damages for the contraction or development of tuberculosis aboard the petitioner's vessel, SS SULTANA, upon which he had served as a fireman for eight days. The case was tried before Bondy, D. J., and a jury on December 7, 8 and 9, 1948 (R. p. 25 *et seq.*).

The petitioner alleged as an affirmative "SECOND DEFENSE" the existence of the plaintiff's tuberculosis prior to his service aboard the petitioner's vessel, and his failure to disclose his disease to the petitioner upon entering its employment (R. pp. 8, 16).

Upon the introduction of the hospital records at the trial it was disclosed that the decedent had been suffering from tuberculosis for a considerable time before he joined the SULTANA (R. p. 86). Counsel for the plaintiff stipulated on the record that the decedent was suffering from tuberculosis on boarding the vessel (R. p. 120), after attempting, over defendant's objection, to change the gravamen of the action to aggravation of the condition (R. p. 88). During the charge to the jury the petitioner's counsel requested certain interrogatories to be submitted to the jury, which the Court declined, but itself prepared and submitted two, which read:

"1. Was the decedent suffering with an advanced case of active pulmonary tuberculosis when he entered the employ of the defendant on May 1, 1945?

2. Did the decedent know at the time he entered the services aboard the SULTANA that he was suffering from active pulmonary tuberculosis?" (R. p. 126).

The jury as a whole failed to answer either interrogatory. As to the first, three jurors answered Yes and the rest did

not answer (R. p. 141). As to the second, eight jurors answered No, the rest not answering (R. p. 141). The jury nevertheless, rendered a general verdict for the plaintiff (R. p. 140), and the Court excused the jury without requiring a positive finding either way upon either interrogatory and without ruling upon the question of whether the petitioner's second defense was valid in law. The Court of Appeals affirmed.

The Decisions Below

The District Court filed no opinion other than a brief memorandum on a point not now before this Court (R. p. 144). The opinion of the Court of Appeals (per Frank, C.J.) stated inter alia:

> "Defendant in its answer set up as a defense that Murphy's illness, if any, existed before his employment on defendant's vessel, and that Murphy failed to disclose that fact when he then entered defendant's employ. Some Courts have recognized such a defense in suits for wages or for maintenance and cure. Whether such a defense is open in a suit like this, we need not decide for these reasons: (a) Assuming arguendo, such a defense to be valid, defendant had the burden of proof. (b) The trial judge submitted to the jury the following special interrogatory: 'Did the decedent know at the time he entered the service aboard the Sultana that he was suffering from active pulmonary tuberculosis?' There was evidence which would reasonably have supported an answer either way. But eight jurors answered No, and four jurors gave no answer because (so the Foreman reported) 'they were undecided and couldn't make up their minds.' This answer was the equivalent of a statement that the defendant had not persuaded the entire jury that Murphy was aware of his illness. The defendant therefore did not discharge its burden of proof as to this defense." (R. p. 156).

The Questions Presented

In a seaman's action for damages based upon aggravation of far-advanced tuberculosis, was his failure to disclose the pre-existence of that disease, of which he had knowledge, a defense available in law to the shipowner and if so, is not the shipowner who interrogates the jury under Federal Rule of Civil Procedure 49(b) upon such defense raised in its pleading entitled to a finding by the jury as to whether that defense has been proved?

Reasons for Granting the Petition

This case brings up a problem of considerable importance to American shipowners. The failure of the seaman to disclose his far-advanced tubercular condition was the subject of an affirmative defense pleaded by the shipowner. Notwithstanding the proof in support thereof the defendant did not receive a finding by the jury that its defense was not proved. The fact that the Court submitted a special interrogatory to the jury on the point justifies the assumption that the defense was valid in law. Although the jury failed to make a special finding, nevertheless it held the defendant liable under a general verdict, obviously a compromise.

In the absence of knowledge or notice of an illness are vessel owners to be held liable to a degree of care beyond that required in respect of normally healthy seamen? Litigants in the Courts of the United States are entitled to know the general conditions upon which such liability hinges. The opinion of the Court of Appeals seems to state that the petitioner could be held liable despite the failure of the jury to make findings consistent with the general verdict and despite the pleading of an affirmative defense and an interrogatory thereon to the jury under Federal Rule of Civil Procedure 49(b) (See Appendix). Under that rule the Court's

duty to require an answer one way or the other from the jury would seem mandatory. The petitioner submits that without a jury finding that its defense was not proved, or a ruling that its defense had no legal force, an essential factor of liability was missing. In glossing the absence of that factor, the courts below have so far departed from the accepted course of judicial proceedings as to require the intervention of this court.

CONCLUSION

It is respectfully submitted that the petition should be granted.

ULYSSES S. THOMAS,
Counsel for Petitioner.

APPENDIX

Federal Rule of Civil Procedure 49(b), 28 U.S.C. following Sec. 723c.

> "GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES: The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."